TIMUR PERMAI HOLDINGS SDN. BHD.

v.

SOON SENG PLYWOOD & TIMBER SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
DATO' LOW HOP BING J
[CIVIL SUIT NO: 22-30-1996]
26 APRIL 1996

CIVIL PROCEDURE: *Injunction - Interlocutory injunction to restrain dealings in land - Principles - Whether there is a good, arguable claim - Whether there is a serious question to be tried - Whether issues merit a trial - Balance of convenience - Whether damages sufficient - Presumption in s. 11(2) of Specific Relief Act 1954.*

CONTRACT: *Sale and purchase of land - Application by purchaser for injunction to restrain vendor from dealing with land - Contract requires vendor to obtain State Authority's consent - Consent not obtained - Purchaser alleges breach of contract by vendor - Unilateral termination by vendor - Whether a contingent contract - Whether contingent or promissory condition - Whether a condition precedent - Implied duty.*

LAND LAW: *Sale of land - Contract for sale - State Authority's consent to sub-division and transfer required under contract - Purchaser alleges breach of contract by vendor - Unilateral termination by vendor - Application by purchaser for injunction to restrain vendor from dealing with land.*

This was an application by the plaintiff for an interlocutory injunction to restrain the defendant from dealing with a piece of land in Kapar, Selangor ('the land'). The plaintiff's application was based on an alleged breach by the defendant of a sale and purchase agreement ('the agreement') entered into between the parties for the sale of the land to the plaintiff. The defendant denied the said allegation, contending that the agreement was lawfully terminated.

The undisputed facts were, *inter alia*, that: (i) under the agreement, the defendant was required to obtain consent from the State Authority for the sub-division and the transfer of the land; (ii) the plaintiff paid 10% of the purchase price amounting to RM490,050 ('the 10%') to the defendant; (iii) the defendant wrote to the plaintiff purportedly terminating the agreement on the ground that the consent could not be obtained; (iv) the defendant refunded the 10% to the plaintiff and requested the plaintiff to vacate the land, notwithstanding the existence of a three-year tenancy (which was to expire upon the completion of the agreement) which it had granted to the plaintiff; and (v) the plaintiff returned the refunded 10% to the defendant, stating that it did not accept the purported termination of the agreement.

The plaintiff contended that no reasonable steps were taken by the defendant to obtain the necessary consent from the State Authority, and that the three-year tenancy was part and parcel of the agreement. The defendant argued that the agreement and the three-year tenancy were separate transactions.

Held:

[1] The principles to be applied in an application for an interlocutory injunction are well established. The plaintiff must show that he has a good, arguable claim to the right he seeks to protect. However, the Court must not attempt to decide the claim based on the affidavits at this stage; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfies these tests, then the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

[2] In the instant application the plaintiff has established a good, arguable claim. The agreement, which has all the characteristics of a binding contract, clearly sets out the parties' mutual contractual rights and obligations which are specifically enforceable. Furthermore, there are several issues emanating from the nature of the agreement and the clauses contained therein which touch on the substantive law of contract, *viz*, terms of contract and ss. 33 & 36 of the Contracts Act 1950.

[3] The plaintiff has established, at this interlocutory stage, that there are several serious questions to be tried which merit a trial. Oral evidence must be adduced to determine the intention of the parties and the contractual obligations undertaken by them.

[4] When considering the balance of convenience, one of the factors to be taken into account in the exercise of the Court's discretion is whether damages would be sufficient as a remedy. If it is, an injunction ought not to be granted. In the instant application, the Court was guided by the presumption laid down in s. 11(2) of the Specific Relief Act 1954, ie, that the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. In the light of the multitude of issues which have arisen, and which can only be resolved at a trial by way of *viva voce* evidence, the *status quo* in relation to the land must be preserved.

[Interlocutory injunction in terms of application granted, and an early trial ordered.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(refd)***

Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212 ***(cit)***

Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors. [1995] 1 CLJ 461 ***(refd)***

Keet Gerald, Francis Noel John v. Mohd Noor bin Abdullah [1995] 1 CLJ 293 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 33, 36(1)
Specific Relief Act 1954, s. 11(2)

Other sources referred to:
Supreme Court Practice 1993, Vol. 1, Part I, p. 511

For the plaintiff - S. Selvarajah (S.M Seenivasagam with him); M/s. Azariah & Assoc. For the defendant - R.R Sethu (V. Balasingam with him); M/s. Balasingam & Co.

JUDGMENT

Low Hop Bing J:

I. Application

The question for determination in this application (Enclosure (2)) is whether an interlocutory injunction should be granted to the plaintiff to restrain the defendant, its servant and/or agent from dealing or giving effect to any dealing with the land known as Geran No. P.N. 7111, Lot No. 26566, Mukim Kapar, Selangor Darul Ehsan (the land).

The plaintiff's application is based on the defendant's alleged breach of a sale and purchase agreement dated 23 March 1994 executed between the plaintiff and the defendant (Exhibit 1 in Enclosure 2 - the agreement). The defendant, on the other hand denied the alleged breach and contended that the agreement has been lawfully terminated.

II. Facts Which are not Disputed

1. The plaintiff entered into the agreement with the defendant to purchase 9 out of 20 acres of the land.

2. Clause 4(a) of the agreement required the defendant to obtain consent from the State Authority, both for the subdivision and the transfer of the land.

3. Pursuant to the agreement, the plaintiff paid 10% of the purchase price to the defendant in two instalments, the first instalment of RM245,025 upon execution of the agreement and the second instalment of RM245,025 on 22 May 1994.

4. The defendant through its surveyors Jurukur Cekap submitted an application for consent to sub-divide on 9 June 1994 although the accompanying letter was dated 11 April 1994 (Exhibit TEK 1 in Encl. 6).

5. By letters dated 16 November 1994 and 21 February 1995 (Exhibit SS-2 and 3 in Encl. 3) the plaintiff through its solicitors wrote to the defendant's solicitors to enquire about the status of the application.

6. The defendant's solicitors did not reply.

7. By a letter dated 5 October 1994 (Exhibit SS-4 in Encl. 3), the plaintiff wrote to the defendant, complaining of the lack of response to its letters and expressing its concern in the delay and further granting an extension of time to the defendant, pursuant to clause 4(b) of the agreement, to obtain the relevant consent as the 18-month period was about to expire.

8. On 30 November 1994, the defendant, through its solicitors, sent a letter to plaintiff's solicitors (Exhibit SS-6 in Encl. 3) purportedly terminating the agreement on the ground that the relevant consent had not been obtained.

9. The plaintiff *vide* letter dated 6 December 1995 (Exhibit SS-7 in Encl. 3) challenged the purported termination as wrongful.

10. The defendant through its solicitors sent a letter dated 29 December 1995 (Exhibit SS-8 in Encl. 3) and returned the sum of RM490,050 being the refund of 10% of the purchase price paid by the plaintiff and requested the defendant to vacate the premises, notwithstanding the existence of a three-year tenancy granted by the defendant to the plaintiff. Such tenancy was to expire upon the completion of the agreement.

11. On 4 January 1996, the plaintiff through its solicitors Messrs. Azariah & Associates (Exhibit 9 in Encl. 3) returned the said sum of RM490,050 and stated that the plaintiff did not accept the defendant's purported termination.

III. Facts Which are Disputed

1. The plaintiff asserts that no reasonable steps were taken by the defendant to obtain the consent from the State Authority.

2. The plaintiff contends that the three year tenancy was part and parcel of the agreement, while the defendant contends that it was a separate transaction.

3. The plaintiff disputes the defendant's interpretation of the parties' rights and obligations under the agreement, particularly in respect of the purported termination.

IV. Should an Interlocutory Injunction be Granted to the Plaintiff?

The principles to be applied in an application for interlocutory injunction have been established in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 and subsequently applied in e.g. *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 and *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6*

Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors. [1995] 1 CLJ 461. These principles have also been summarised in the Supreme Court Practice 1993 Vol. 1 Part I page 511 as follows:

(1) the plaintiff must establish that he had a good arguable claim to the right he seeks to protect;

(2) the Court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried;

(3) if the plaintiff satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

The plaintiff submits that it has more than satisfied each of these requirements, while the defendant contends that no purpose is served by an injunction, when clearly there can be no specific performance of the agreement.

1. Good Arguable Claim

In my judgment, the agreement sets out the parties' mutual contractual rights and obligations, which are specifically enforceable.

The agreement has all the characteristics of a binding contract i.e. there is an offer and acceptance, culminating *consensus ad idem*; consideration has passed in the form of payment of a deposit (of nearly RM500,000) and exchange of promises; there is certainty and finality; and a clear intention to create legal relations is reflected in the agreement which was prepared by respective solicitors for both the plaintiff and the defendant, and duly stamped.

Under the agreement, the following issues arise:

(a) whether clause 4(a) of the agreement is a promissory condition, the breach of which entitles the plaintiff to seek specific performance and whether the failure of the defendant to obtain the relevant consent within the stipulated time in clause 4(a) and/or the failure to seek an extension to obtain the relevant consent constitutes a breach of clause 4(a)?

(b) whether the agreement is a contingent contract within the definition of s. 33 of the Contracts Act 1950? If so,

(i) whether clause 4(a) was contingent condition rather than a promissory condition?

(ii) whether clause 4(a) is a condition precedent to the formation of a binding contract or a condition precedent to the performance of the contract?

(c) Whether the defendant was under an implied duty to take all reasonable and necessary steps to apply for and obtain the relevant consent?

(d) In the event of such an implied duty, whether the defendants had acted in breach of this implied duty and if so, whether the defendant can rely on s. 36(l) of the Contracts Act 1950 as a defence to the breach of its implied duty and terminate the agreement on the ground that the relevant consent was not obtained within 18 months?

In view of the above, I hold that the plaintiff has established a good arguable claim.

2. Serious Questions to be Tried

Lord Diplock in *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396 in dealing with this requirement stated that the Court must not attempt to decide the claim on affidavits. It would be sufficient if there are serious questions to be tried. This case, as averted to above, was followed by the Supreme Court in *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors.* [1995] 1 CLJ 461, at 548, as follows:

> At an interlocutory proceeding for an injunction the Court is not called upon nor is not desirable for the Court to decide finally on the rights of the parties but the Court must be satisfied that there is a serious issue to be tried. The Court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law now hallowed by the famous words of Lord Diplock in the *American Cyanamid's* case:
>
> > ... It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.

In *Keet Gerald, Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293, Gopal Sri Ram JCA at page 206 held as follows:

> To summarize, a Judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
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> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at the stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial ...

In my judgment, oral evidence must be adduced to determine the intention of the parties and the contractual obligations undertaken by them to bring about the obtaining of the relevant consent, and whether the defendant had acted in breach of its implied duty.

Suffice to say at this interlocutory stage that there are several serious questions to be tried, as I have enumerated under the heading in relation to a "good arguable claim".

3. Balance of Convenience

When considering the balance of convenience, one of the factors to the exercise of discretion is whether damages would be sufficient remedy and if so an injunction ought not to be granted.

In exercising the discretion on the balance of convenience, I am guided by the presumption laid down in s. 11(2) of the Specific Relief Act 1954 which reads:

> Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

Conclusion

In the light of the multitude of issues adumbrated above which can be resolved only at the trial by way of *viva voce* evidence, I am of the view that the *status quo* in relation to the land must be preserved. I therefore grant an interlocutory injunction in terms of this application. In the interest of justice, I order an early trial of this suit.

Reported by Gan Peng Chiang